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NOTES

INTERNATIONAL TRADE AND THE ENVIRONMENT: WHAT IS THE ROLE OF THE WTO?*

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I. INTRODUCTION

Increasingly, the international community has been forced to recognize that the state of the environment is a global concern.¹ Unfortunately, the nature of the problem itself is not one which can be addressed unilaterally, as it does not relate exclusively to any individual state.² Concurrent with this growing public awareness is a recognition of the interrelationship between trade liberalization and the environment.³ The revelation that the desire to protect health and the environment sometimes comes into conflict with the stated goals of international trade, although not new, came into the spotlight in 1999.⁴ The convergence of thousands of protestors in Seattle for the gathering of the World Trade Organization's Third Ministerial Conference illustrated the growing divide between free traders and environmentalists.⁵ This signaled a new round in a conflict that has grown exponentially since the creation of the World Trade Organiza-

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1. See Tania Voon, *Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol*, 10 J. TRANSNAT'L L. & POL'Y 71 (2000).

2. See *id.* at 72.

3. See *id.*

4. See *id.*

5. See *id.* (discussing the "growing disquiet over the unresolved conflict between trade and the environment").

tion in 1995. To much of the world, the WTO is an organization that has exceeded its mandate; it not only sets the rules for international trade, but it establishes the environmental protection standards for its member governments as well.⁶

This note will attempt to examine the sometimes conflicting interests of the WTO and environmental advocates, specifically the structure and policies of the WTO as they relate to environmental protection. Part II provides some of the historical background and sets the stage for the current debate, including the formation of the WTO, and its reaction to the sometimes harsh criticism it has endured. Part III discusses the official position of the WTO, as it relates to environmental issues, and juxtaposes it against some of the Appellate Body's decisions in this regard. Part V offers some of the more notable suggestions for reconciling the conflict between WTO standards and environmental protection concerns.

II. THE DEBATE BETWEEN FREE TRADE AND THE ENVIRONMENT

The origins of the trade and environment debate date as far back as 1972.⁷ At the time, environmental protection concerns were just coming into the forefront of domestic and international policy considerations.⁸ The recognition of a need for an international forum in which to hear environmental management concerns led to the 1972 Stockholm Conference on the Human Environment.⁹ In preparation for this conference, GATT members created the Working Group on Environmental Measures and International Trade (EMIT).¹⁰ Although EMIT did not conduct its first meeting until twenty years later, its first conference was conducted right before the 1992 United

6. Doaa Abdel Motaal, *Trade and the Environment in the World Trade Organization: Dispelling Misconceptions*, 8 REV. OF EUR. CMTY. & INT'L ENVTL. L. 330, 330 (1999).

7. See Julio Garcia Burgues & Mikel Insausti Muguruza, *Trade and the Environment in the WTO: The European Community's Participation in the Committee on Trade and Environment*, 6 REV. OF EUR. CMTY. & INT'L ENVTL. L. 163, 163 (1997).

8. See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 17 (2001).

9. See Katie A. Lane, Comment, *Protectionism or Environmental Activism? The WTO as a Means of Reconciling the Conflict Between Global Free Trade and the Environment*, 32 U. MIAMI INTER-AM. L. REV. 103, 105 (2001).

10. See Shaffer, *supra* note 8, at 17.

Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro, (also known as the Rio Earth Summit).¹¹ This was no coincidence, in that the EMIT group was convened at the request of members of the European Free Trade Association (EFTA), in anticipation of UNCED.¹²

During the interim period between these two conferences important developments took place in several environmental forums. In 1983, the United Nations convened the World Commission on Environment and Development to address the growing concern “about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development.”¹³ The Commission’s report, entitled “Our Common Future” (also known as the Brundtland Report), coined the term “sustainable development.”¹⁴ It identified poverty as one of the most important causes of environmental degradation, and proposed that greater economic growth through increased international trade would act to reverse this trend.¹⁵

The Rio Earth Summit focused attention on the role of international trade in combating poverty and protection of the environment.¹⁶ Specifically, Agenda 21, the measure adopted at the conference, emphasizes the importance of international trade in promoting the concept of “sustainable development.”¹⁷ In the latter part of the Uruguay Round of negotiations, as a result of the renewed interest in the relationship between trade and the environment, the Preamble to the Marrakesh Agreement Establishing the WTO, reference was made to the importance of working towards sustained development.¹⁸ Members recognized that:

11. U.N. Conference on Env’t and Dev.: Rio Declaration on Env’t and Dev., June 3-14, 1992, 31 ILM 874 [hereinafter *Rio Declaration*].

12. WTO Secretariat, *Trade and Environment at the WTO*, (Apr. 2004), http://www.wto.org/english/tratop_e/envir_e/envir_wto2004_e.pdf [hereinafter *2004 Report*].

13. U.N. Env’t Program Governing Council, Report of the World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc. UNEP/GC.14/13, ES-7 (Mar. 20, 1987) (prepared by Gro Brundtland) [hereinafter the *Brundtland Report*].

14. *Id.*

15. *See id.*

16. WTO, Early Years: Emerging Environment Debate in GATT/WTO, http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (last visited Mar. 25, 2009).

17. *See 2004 Report, supra* note 12, at 4.

18. *Id.*

[T]heir relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living ... while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development* seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.¹⁹

In addition, a ministerial decision arising out of the Marrakesh Agreement was adopted, calling for the establishment of the Committee on Trade and Environment (CTE).²⁰ The Committee's mandate calls for the identification of the relationship between trade measures and environmental measures in order to promote sustainable development. Additionally, it is incumbent upon the CTE to make appropriate recommendations as to the necessity of any modifications to the provisions of the multilateral trading system.²¹ To the extent the CTE has this broad mandate, it is significantly more influential than its predecessor the EMIT group.²²

More recently, at the Doha Ministerial Conference begun in November 2001, the ministers agreed to launch negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEA's).²³ These talks will seek to clarify the relationship between trade measures taken under the environmental agreements and WTO rules.²⁴ The negotiations themselves are conducted in "special sessions" of the CTE, in which the Committee acts as the forum whereby the environmental and developmental aspects of international trade are debated.²⁵ The CTE "regular" is charged with examining the effects of environmental measures on market access, the intellectual property

19. *Id.* at 4-5.

20. *Id.* at 5.

21. *Id.*

22. *Id.*

23. WTO, The Doha Declaration Explained, http://www.wto.org/english/tra-top_e/dda_e/dohaexplained_e.htm (last visited Mar. 25, 2009).

24. *Id.*

25. See 2004 Report, *supra* note 12, at 5.

agreement and biodiversity, and labeling for environmental purposes.²⁶

The increased interest in the relationship between trade and the environment was spurred by the progressive reinforcement of environmental policies at the national and international level, and the concerns these policies addressed.²⁷ Chief among these concerns was the possible effects that environmental measures might have on trade and competitiveness.²⁸ Just as importantly, however, following some GATT panel decisions, a widespread perception was beginning to emerge among environmental advocates that the multilateral trading system was not sufficiently sympathetic to environmental concerns.²⁹

III. WTO RULES: ARE THEY A CAUSE FOR CONCERN?

A. *The Position of the WTO*

The WTO has no specific agreement dealing with the environment. It does, however, have different provisions within its articles confirming the rights of its members to implement environmental protection measures, provided certain conditions are met.³⁰ Although the Preamble to the Marrakesh Agreement contains language affirming the importance of sustainable development and environmental protection, the WTO is not an environmental protection agency and does not aspire to be one.³¹ The organization's principal mandate is to work towards an open, equitable, non-discriminatory trading system.³² It only addresses environmental issues insofar as these policies have trade related aspects with a discriminatory impact on trade.³³ In defending itself from the criticism of being environmentally unfriendly, the WTO states that the task of setting international rules for environmental protection is given to other environmental agencies and conventions.³⁴ This, notwithstanding, while the reduc-

26. *See id.*

27. Burgues & Muguruza, *supra* note 7.

28. *Id.*

29. *Id.*

30. *See 2004 Report, supra* note 12, at 7.

31. *Id.* at 6.

32. *See Motaal, supra* note 6, at 330.

33. *Id.*

34. *Id.*

tion of tariffs has resulted in an expansion of international trade, it has been accompanied by a corresponding increase in the exploitation of the earth's natural resources.³⁵ While technically correct in this regard, the WTO must also recognize its role in the application of trade policy which serves to undermine ecological protections established by the very environmental agencies and conventions to which they defer.

To further illuminate this point, one must assess how the WTO deals with the trade related aspects of environmental policies. This encompasses an examination of various agreements entered into by WTO members, as well as some of the decisions rendered by the Dispute Settlement Body. The WTO has categorized trade related environmental concerns thusly: while some take the form of product standards requiring a certain level of environmental efficiency,³⁶ others take the form of outright bans, foreclosing the use of some environmentally harmful goods.³⁷ Yet, others may exist in the form of government subsidies for environmentally friendly merchandise or production methods.³⁸

Product standards are dealt with primarily through the WTO Agreement on Technical Barriers to Trade (TBT). The TBT Agreement has been designed by WTO member governments in such a way that it acknowledges the right of each individual government to set environmental protection standards at a level it considers appropriate.³⁹ Moreover, the TBT recognizes the protection of human, animal or plant life or health, and the protection of the environment as being legitimate objectives for member countries to pursue.⁴⁰

35. Andy J. Rich, *International Trade and the Environment: A Seething Antagonism?*, 12 *Currents: S. Tex. INT'L TRADE L.J.* 17 (2003).

36. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125 (1994) [hereinafter *TBT Agreement*].

37. General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter the *GATT*]. The first General Agreement on Tariffs and Trade came into effect in 1947, however, as a result of the various negotiating rounds, including the major overhaul in 1994, the agreement exists in its current form as *GATT 1994*.

38. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125 (1994) [hereinafter *SCM Agreement*].

39. *TBT Agreement*, *supra* note 36, at Preamble.

40. *See id.*

However, the Agreement attempts to ensure that these standards are neither discriminatory, nor create unnecessary obstacles to international trade.⁴¹ For example, a country must apply any environmental standard for a product to all such products, regardless of their source.⁴² It must not relax its standards towards those which are imported from a particular source, nor towards those that are produced domestically.⁴³ In addition, though member governments may develop product standards that create obstacles to trade, they must ensure that these obstacles are not avoidable ones.⁴⁴ If avoidable, the least trade restrictive measure must be sought.⁴⁵

WTO rules pertaining to bans are set out in Article XI of the General Agreement on Tariffs and Trade (GATT). Article XI for the most part forbids the use, by a member country, of quantitative restrictions and prohibitions. As a result, any ban put into place by a WTO member would automatically be inconsistent with Article XI.⁴⁶ Prior to the creation of the WTO, however, GATT contracting parties recognized the need for a trade measure that might be inconsistent with the rules of Article XI.⁴⁷ Thus, the General Exceptions of Article XX were created. These exceptions allow member nations to implement trade policies with environmental objectives that are otherwise inconsistent with GATT rules, provided certain conditions are met.⁴⁸ First, the measure must fall within one of the listed exceptions specified in Article XX. In the context of measures addressing environmental concerns, the applicable exceptions include: 1) the measure is “necessary” for the protection of the environment (XXb), or 2) “related” to the conservation of exhaustible natural resources (XXg). Second, the measure must meet the conditions of Article XX’s chapeau. It must be applied in a way that does not constitute arbitrary or unjustifiable discrimination between countries, or act as a disguised restriction on trade.⁴⁹ It is important to note

41. *Id.* at art. 2.2. The Agreement calls for non-discrimination in the preparation, adoption and application of product specifications and conformity assessment procedures.

42. *Id.* at arts. 2.1, 5.1.1.

43. *Id.* at art. 2.1.

44. *Id.* at art. 2.2.

45. *Id.* Contrast this standard with that of the *GATT*; see discussion *infra* pp. 222-223.

46. See *GATT*, *supra* note 37, at art. XI.

47. *2004 Report*, *supra* note 12, at 50.

48. See *GATT*, *supra* note 37, at art. XX.

49. *Id.*

that the analysis for an Article XX exception does not put the necessity of the environmental objective into question; instead it questions the necessity of the trade measure used to achieve the objective.⁵⁰ For example, if a WTO member government can prove that a ban implemented falls within Article XX (b) or (g), and the ban is not applied in a discriminatory manner either between countries or in a way that affords protection to domestic industry (chapeau), then it can circumvent Article XI by way of an Article XX exception.

With respect to subsidization, the Agreement on Subsidies and Countervailing Measures (SCM) is an agreement that was created by WTO member governments to regulate their use of subsidies for products manufactured within a given state.⁵¹ Under this agreement, certain subsidies were designated "non-actionable," thus generally removing them from the prohibition.⁵² These non-actionable subsidies expired in 2000, pursuant to Article 31 of the SCM Agreement.⁵³ Previously, however, non-actionable subsidies related to environmental concerns were permitted when used to promote the adaptation of existing facilities to new environmental requirements. Once again, certain conditions had to be met for their application.⁵⁴ For instance, the subsidy had to be made available to all firms which adopted the new equipment, was limited to 20% of the adaptation costs, did not cover the cost of replacing and operating the assisted investment, was directly limited to planned reduction in a firm's pollution, and did not cover any manufacturing cost savings.⁵⁵ In addition, the subsidy must be a one time non-recurring measure.⁵⁶ Therefore, subsidies having an adverse impact on trade were still allowed under the SCM Agreement, so long as they were used for certain environmental purposes.

As mentioned earlier the WTO is quick to point out that it does not set the rules for environmental protection or establish any standards in this regard.⁵⁷ It only sets conditions that environmental measures

50. Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos*].

51. *SCM Agreement*, *supra* note 38.

52. *Id.* at art. 8.

53. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 269 (3d ed. 2005).

54. *SCM Agreement*, *supra* note 38, at art. 8.2 (c).

55. See TREBILCOCK & HOWSE, *supra* note 53, at 269.

56. *Id.*

57. See discussion, *supra* p. 201.

must meet when they have an impact on trade. Though these rules are not designed to undermine the environmental protection objectives of member governments, their application has effectively reduced the ability of countries to set their own environmental agenda.⁵⁸ This puts the WTO's stated position at odds with the practical effects of their policies. This contradiction is underscored in several panel and Appellate Body decisions involving U.S. attempts to set its own environmental policy.

B. WTO v. U.S. Domestic Environmental Regulations

WTO panels and the Appellate Body are the established organs to resolve disputes among WTO members. Although they are not bound by precedent in the same manner as domestic courts in the U.S., previous rulings on similar issues are likely to be the best indicators for predicting how the WTO might deal with disputes involving environmental matters. Several American attempts at implementing a policy centered on "sustainable development," have been thwarted by certain key rulings. The following cases illustrate the concerns of some environmental advocates for the future viability of environmental protection measures.

1. Tuna-Dolphin I

The first of these decisions arose out of a dispute between the United States and Mexico (Tuna-Dolphin I).⁵⁹ In 1972, the U.S. enacted legislation in the form of the Marine Mammal Protection Act (MMPA).⁶⁰ The MMPA established a moratorium on the taking of dolphins in the Eastern Tropical Pacific Ocean by U.S. fishermen.⁶¹ It also provided protection for whales, seals, polar bears and other sea mammals.⁶² The Act regulated the harvesting of yellowfin tuna in the hope of reducing dolphin mortality incidental to the use

58. See Andrew Green, *Climate Change, Regulatory Policy and the WTO*, 8 J. INT'L ECON. L. 143 (2005).

59. Report of the Panel, *United States – Restriction on Imports of Tuna* (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna-Dolphin I*].

60. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (2000) [hereinafter *MMPA*].

61. Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 98 (1999); see also 16 U.S.C. § 1371 (a).

62. Miller & Croston, *supra* note 61, at 97.

of purse-sein fishing nets,⁶³ and provided for a ban on tuna imported from "intermediary nations."⁶⁴ By 1977 the MMPA helped reduce dolphin mortality related to tuna harvesting from 300,000 dolphin deaths per year to a little over 25,000.⁶⁵ As the statute applied solely to U.S. vessels, several American fishermen, in an attempt to avoid the domestic restrictions, engaged in the practice of sailing under foreign flags.⁶⁶ Congress responded by amending the MMPA in 1984, requiring foreign imports of tuna to have been harvested under comparable or equivalent standards as those employed by U.S. vessels.⁶⁷ If these standards were not met the Secretary of Commerce was empowered to issue an embargo on the importation of these environmentally unfriendly products.⁶⁸ The import of tuna was essentially prohibited, unless a determination was made by U.S. authorities that they were caught using measures comparable to those employed by the United States.⁶⁹

The restrictions imposed by the MMPA were challenged by Mexico under Articles I, III, IX, XI and XIII of the GATT 1947.⁷⁰ Specifically, Mexico challenged the provision in the MMPA that prohibited the importation into the U.S. of yellowfin tuna, which were caught using methods that resulted in the collateral injury to dolphins. The Panel concluded that the import restrictions were not internal regulations in accordance with Article III, were inconsistent with Article XI, and were not saved by the exceptions of Article XX. The Panel's decision in this case was not adopted because under the GATT 1947 a consensus was required to accept a decision prior to its adoption, and the U.S. and Mexico settled their differences outside of the GATT framework. Nonetheless, the most significant portion of the report concerned the extraterritorial application of the MMPA. The Panel ruled that jurisdiction to protect plant or animal life does not extend outside the territory of the nation imposing the restriction.⁷¹ The Panel's approach to extraterritoriality focused on Article XX (g)'s requirement that the measure be taken in conjunc-

63. See *MMPA*, *supra* note 60 § 1362 (5).

64. *Id.*

65. Miller & Croston, *supra* note 61, at 98.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See *Tuna-Dolphin I*, *supra* note 59, ¶¶ 3.1-3.9.

71. *Id.* ¶ 5.31.

tion with the restrictions on domestic production or consumption. According to the Panel: “A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction.”⁷²

Another key portion of the Panel decision involved its “like product” analysis. The Panel concluded that differences in a process or production method were not relevant to determining “likeness.”⁷³ This case resulted in the rule that products produced in an environmentally unfriendly manner cannot be treated differently than products produced in an environmentally friendly manner, on the sole basis of the difference in process or production method.⁷⁴ Consequently, the sale of the tuna within U.S. borders did not afford the right to protect animals in international waters outside of the United States affected by the “process” used to obtain the tuna.

2. Tuna-Dolphin II

A similar complaint was made by the European Economic Community and the Netherlands in the second Tuna-Dolphin case (Tuna-Dolphin II).⁷⁵ This second panel decision upheld parts of the previous panel’s findings and rejected others.⁷⁶ As in the previous report, the Panel emphasized the importance of promoting sustainable development, but refused to endorse any particular method of environmental conservation.⁷⁷ The United States continued to prohibit imports that had been harvested in violation of the MMPA both from “primary nations” and “intermediary nations.”⁷⁸ The complainants argued that the embargo constituted a quantitative restriction in violation of Article XI. Once again, the U.S. countered that the MMPA qualified for an exception under Article XX (b) and (g), and that the embargo was necessary to enforce the restrictions on the import of tuna harvested in a manner inconsistent with U.S. standards.⁷⁹ Ac-

72. *Id.*

73. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 360 (5th prtg. 2007).

74. *Id.* at 316.

75. Report of the Panel, *United States – Restrictions on Imports of Tuna*, unadopted, DS29/R (June 16, 1994) [hereinafter *Tuna-Dolphin II*].

76. *See generally id.*

77. *Id.* ¶ 5.42.

78. *Id.* ¶ 2.

79. *Id.* ¶ 3.6.

ording to the U.S., this necessarily included restrictions on imports from countries that process and export tuna from sources whose methods did not conform to these standards, so called "intermediary nations."

The Panel concluded that the U.S. import restrictions were not justified as measures necessary to protect human, animal, or plant life and health under Article XX (b), nor were they "primarily aimed" at the conservation of exhaustible natural resources, as required under Article XX (g).⁸⁰ The U.S. did prevail, however, on one important point; the Panel deemed efforts to protect dolphins to be a valid policy to conserve an exhaustible natural resource.⁸¹ In so doing, the Panel noted that the provisions of Article XX (g) were not limited to resources located in the territory of the country imposing the restrictions.⁸² This conclusion was in direct contravention of the narrower domestic reading of Article XX (g) by the earlier Tuna-dolphin I panel.

Of particular import was the Panel's suggestion that international environmental treaties were irrelevant to its analysis. The reason given by the Panel was that these treaties were not concluded by the contracting parties to the GATT, and thus were not applicable to the interpretation of its provisions.⁸³ The implication of this position is that international agreements existing outside of the GATT are marginalized, and thus rendered moot when considered in any trade related context.⁸⁴ Not only is this reasoning untenable in the context of environmental protection efforts, it is inconsistent with the Vienna Convention.⁸⁵

As was the case in Tuna-Dolphin I, the United States was able to veto the adoption of the Tuna-Dolphin II panel report. Nonetheless, these two cases became the standard by which unilaterally applied environmental measures are evaluated.⁸⁶ The United States was placed in the difficult position of having to make the choice between

80. *Id.* ¶ 5.27.

81. *Id.* ¶ 5.13.

82. *Id.* ¶¶ 5.16-5.20.

83. See TREBILCOCK & HOWSE, *supra* note 53, at 134-35. The authors suggest that the Panel's interpretation in this regard implies a conception of the GATT as a "self-contained regime, sealed off from the norms and rules of other international regimes and the values and constituencies that these reflect." *Id.*

84. *Id.*

85. See Vienna Convention on the Interpretation of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

86. See Miller & Croston, *supra* note 61, at 107.

following its own statutorily enacted mandates or abiding by the obligations imposed upon it by the GATT.⁸⁷ If the United States complied with the decisions of the GATT panel, it would be forced to retreat on conservation policies that reflected the prevailing public sentiment of its citizenry.⁸⁸ By refusing to follow the Panel's decision, however, the U.S. would jeopardize its standing in the international community and risk suffering sanctions from affected nations.⁸⁹ These rulings underscore the tension between environmental protection efforts on the one hand and international trade on the other.

3. Reformulated Gasoline

Shortly after the formation of the WTO, Venezuela and Brazil requested the formation of a dispute settlement panel to decide whether certain regulations of the United States Clean Air Act,⁹⁰ and more specifically, the U.S. Environmental Protection Agency's (EPA's) "Gasoline Rule"⁹¹ were inconsistent with WTO obligations.⁹² These regulations, intended to reduce air pollution in the United States, required that gasoline sold in certain U.S. regions with high levels of air pollution meet a specific pollution standard.⁹³ This "reformulated" gasoline was contrasted with "conventional" gasoline whose sale was allowed in all other parts of the U.S.⁹⁴ The conventional gasoline had to meet, at a minimum, the same pollution standards as gasoline sold in 1990 (baseline standard).⁹⁵ One of the objectives of the conventional gasoline standard was to prevent the blending of pollutants removed from the reformulated gasoline into conventional

87. *Id.*

88. *Id.*

89. *Id.*

90. Clean Air Act, 42 U.S.C. §§ 7401-7671 (2000). The Clean Air Act sets limits on certain air pollutants, including how much can be in the air anywhere in the United States. The Environmental Protection Agency is the regulating authority charged with enforcing the Act's provisions. Individual states may have more stringent air pollution laws, but they may not have less restrictive standards.

91. Regulation of Fuel and Fuel Additives-Standards for Reformulated and Conventional Gasoline, 40 C.F.R. § 80 (2007).

92. Panel Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *Gasoline Panel Report*].

93. See Clean Air Act § 211 (k)(2)-(3) (2000).

94. See *id.* § 211(k)(8).

95. *Id.*

gasoline.⁹⁶ To achieve this objective for producers who were not in operation in 1990, and for importers, a statutory baseline was established in place of the producer specific 1990 baseline.⁹⁷ At the heart of the dispute was the fact that most foreign producers were not eligible for the less strict individual baselines, and instead had to rely on the harsher statutory baselines.⁹⁸

The claim against the U.S. was based on the position that the regulations of the Clean Air Act, and the Gasoline Rule, were inconsistent with Article III and not covered by the exceptions of Article XX.⁹⁹ The Panel concluded that the regulations treated importers of gasoline less favorably than domestic producers, and were therefore inconsistent with the provisions of Article III.¹⁰⁰ Although the Panel found that the regulation was not excepted by Article XX (b), (d) and (g), the Appellate Body ruled that the baseline standards fell within the Article XX (g) exception.¹⁰¹ They did not, however, comply with the chapeau of Article XX, which prohibits the application of an environmental measure in a way that constitutes: 1) arbitrary discrimination; 2) unjustifiable discrimination; or 3) a disguised restriction of international trade.¹⁰² In the Appellate Body's view, the fundamental purpose of the introductory clause was to avoid abuse or illegitimate use of the Article XX exceptions.¹⁰³ In applying the introductory clause, the Appellate Body found that the United States had alternative courses of action available to it when it implemented the Clean Air Act.¹⁰⁴ This meant that the Appellate Body found the measures to be related to the conservation of an exhaustible natural resource (clean air), and were made in conjunction with restrictions on domestic production or consumption, but were nevertheless an unjustifiable discrimination and a disguised restriction on international trade.¹⁰⁵ The basis for this conclusion was that the domestic producers had the choice to establish their own 1990

96. See *Gasoline Panel Report*, *supra* note 92, ¶ 2.4.

97. See 40 C.F.R. § 80.

98. See *Gasoline Panel Report*, *supra* note 92, ¶ 3.7.

99. *Id.* ¶ 3.1.

100. *Id.* ¶ 6.10. This issue was not considered by the Appellate Body, in that the United States did not appeal this portion of the Panel's ruling.

101. See Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, 35 ILM 603, 633 (May 20, 1996).

102. *Id.* at 633.

103. *Id.* at 629.

104. *Id.*

105. *Id.* at 633.

baselines or rely on the statutory baseline. Foreign producers, on the other hand, did not have the option of establishing facility specific baselines.¹⁰⁶ The Appellate Body suggested that alternative courses of action could have included the imposition of statutory baselines for all gasoline producers, or the availability of individual baselines for all foreign, as well as domestic, producers.¹⁰⁷

Finally, the Appellate Body concluded that cooperative arrangements could have been sought by the U.S with foreign producers to reach the same result.¹⁰⁸ This raises the issue of what has been termed “multilateral environmental agreements,” and their relationship to the provisions of the multilateral trading system. The Appellate Body appears to endorse the widely held recognition that resort to multilateral solutions to transboundary environmental problems is preferable to unilateral solutions.¹⁰⁹ It has not, however, taken the opportunity to directly confront the potential conflicts inherent in these types of agreements.

4. Shrimp-Turtle I

The most recent case involving U.S. attempts at implementing environmental protection measures directly affecting trade arose when certain provisions of the U.S. Endangered Species Act were challenged by India, Malaysia, Pakistan and Thailand.¹¹⁰ In 1989, the United States Congress amended Title 8 of the Endangered Species Act, with Section 609, to afford protection to sea turtles on an international basis.¹¹¹ Prior to its amendment, the Act extended protection to various species of sea turtles only within U.S waters.¹¹² In circumstances similar to those in the Tuna-Dolphin case, sea turtle mortality was directly related to commercial shrimp trawling activ-

106. *Id.* at 609-10.

107. *Id.* at 629.

108. *Id.* at 631.

109. See 2004 Report, *supra* note 12, at 35.

110. See Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle I AB Report*]; see also Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS59/R (May 15, 1998) [hereinafter *Shrimp-Turtle I Panel Report*].

111. See Endangered Species Act of 1973, 16 U.S.C. § 1537 (2000).

112. *Id.* §§ 1531-1544 (2000).

ity.¹¹³ Specifically, the use of nets in the harvesting of shrimp resulted in the incidental death of sea turtles to the extent that they fell under the protections of the Endangered Species Act.¹¹⁴ Section 609 required shrimp trawlers to use “turtle excluder devices” (TED’s) in their shrimp nets when fishing in areas that were likely to be turtle habitats.¹¹⁵ The statute further restricted the importation of shrimp and shrimp products to countries with comparable regulations in place, or who could demonstrate that their fishing practices did not pose a threat to turtles. Countries could demonstrate compliance through a certification process.¹¹⁶ In practice, exporting countries had to demonstrate the use of TED’s in order to be certified under this law.¹¹⁷ The certification requirement was immediately challenged under Articles I, III and XI of the GATT. The Panel established to decide the issue concluded that the certification requirement violated Article XI (1), and was not justified under Article XX.¹¹⁸ The United States did not argue, nor did the Panel consider, the import restriction as an overall regulatory measure enforced at the border.¹¹⁹ Under this type of scheme the applicable provision under WTO law is Article III’s National Treatment obligation. As the Appellate Body would decide sometime later, the key distinction is whether a border measure is backed up by some internal regulation.¹²⁰ The Panel ruled that the measures imposed by the United States were outside the ambit of Article XX, and were precluded by the chapeau of Article XX as a threat to the integrity of the trading system.¹²¹

On review, the Appellate Body reversed the sequence of analysis undertaken by the Panel.¹²² According to the Appellate Body, the more sound approach is to first determine whether the measure falls under the exceptions listed under Article XX (a)-(j). If so, the next step is to examine whether the measure conforms to the chapeau’s

113. See George Cavros, *The Hidden Cost of Free Trade: The Impact of United States World Trade Obligations on United States Environmental Law Sovereignty*, 9 ILSA J. INT’L & COMP L. 563, 568 (2002-2003).

114. See *id.*

115. See 16 U.S.C. § 1537.

116. *Id.*

117. *Id.*

118. *Shrimp-Turtle I Panel Report*, *supra* note 110, ¶¶ 7.12, 7.62.

119. TREBILCOCK & HOWSE, *supra* note 53, at 529.

120. See *EC-Asbestos*, *supra* note 50.

121. *Shrimp-Turtle I Panel Report*, *supra* note 110, ¶ 7.51.

122. *Shrimp-Turtle I AB Report*, *supra* note 110, ¶¶ 117-23.

requirements. First, the Appellate Body concluded that the exceptions of Article XX exist in order to justify otherwise inconsistent trade measures, so long as the policies are recognized as legitimate.¹²³ For this reason, the Appellate Body proceeded to analyze Section 609 under Article XX (g). Recognizing that sea turtles were an endangered species,¹²⁴ the conclusion that they were an exhaustible natural resource followed easily.¹²⁵ Thus, the first prong of the analysis was satisfied. Next, the Appellate Body determined that the measure was “related to” the conservation of an exhaustible natural resource.¹²⁶ The policy was a justifiable means to the ends of protecting sea turtles satisfying the second prong of Article XX (g). After finding the measure to have been applied “in conjunction with” restrictions on domestic production or consumption, the Appellate Body proceeded to the final step of the analysis; the chapeau of Article XX.¹²⁷

Under the chapeau’s second tier of analysis, the Appellate Body concluded that while the measure was provisionally justified under Article XX (g), it did not meet the conditions set out in the chapeau, and therefore was not exempt. Notwithstanding the fact that a multilateral environmental agreement was in place,¹²⁸ the Appellate Body found the United States was guilty of unjustifiable discrimination because of its failure to conduct bilateral or multilateral negotiations with affected countries in an attempt to come to a cooperative agreement.¹²⁹ The Appellate Body noted that the United States did

123. *Id.* ¶ 121.

124. *Id.* ¶ 132.

125. *Id.* ¶ 134. The Appellate Body pointed out that “One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.” *Id.* ¶ 128.

126. *Id.* ¶ 142.

127. *Id.* ¶ 145.

128. The United States and all of the complaining parties in this case were, and still are, Contracting Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Agreement’s aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. In fact, the Appellate Body adopted this multilateral environmental agreement as an interpretational tool to conclude that sea turtles were in fact an endangered species.

129. The Appellate Body relied on Section 609’s requirement that negotiations be conducted in an effort to come to a cooperative agreement with regard to sea turtle protection.

negotiate with some countries to produce the Inter-American Convention for the Protection and Conservation of Sea Turtles, but not with others.¹³⁰ The result of the failure of the United States in this regard was a finding of unjustifiable discrimination. Some observers have taken this part of the Appellate Body's ruling to impart a stand alone duty to negotiate as a precondition to employing an environmental trade measure.¹³¹ This interpretation, however, does not comport with the specific wording of the Appellate Body in their decision. The Appellate Body never asserted that the chapeau of Article XX imposed a "sui generis" obligation to negotiate.¹³² Rather, it requires a member to negotiate in good faith with affected parties to the extent that it has already done so with other parties affected by the trade measure.¹³³ Supporting this interpretation is the Appellate Body's focus on the ordinary meaning of the text of Article XX, specifically its chapeau.¹³⁴ There is nothing in the text of Article XX or its chapeau that can be read to impose a duty to negotiate in the absence of discrimination between countries where the same conditions prevail.¹³⁵ Although the Appellate Body relied on the Rio Declaration and other sources of international environmental law to hold that global environmental concerns should be dealt with cooperatively and not unilaterally, it did not incorporate into the chapeau a duty to negotiate.¹³⁶ Rather, it was using international environmental law as a baseline in assessing whether the U.S. measure was unjustifiable.¹³⁷

In perhaps the most significant portion of the decision, the Appellate Body reversed the Panel decision on the issue of whether trade measures directed at other states' environmental policies was consis-

130. Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, 34 ILM 1246 (1998).

131. See John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 41 (2004).

132. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for The Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 507 (2002).

133. *Id.* at 508.

134. See *Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 150.

135. See Howard F. Chang, *Environmental Trade Measures, The Shrimp-Turtle Rulings, and The Ordinary Meaning of The Text of The GATT*, 8 CHAP. L. REV. 25, 47 (2005).

136. Howse, *supra* note 132, at 508.

137. *Id.*

tent with Article XX (g).¹³⁸ Consequently, these measures are no longer per se inconsistent with the objectives of the multilateral trading system.¹³⁹ The Appellate Body was careful not to unconditionally endorse the use of extra-jurisdictional measures in that it required “a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX (g).”¹⁴⁰ In another significant departure from the prior decisions, the Appellate Body determined that unilateral trade measures were not *a priori* excluded from the protection of Article XX.¹⁴¹ Such a reading, according to the judges, would render most, if not all, the provisions of Article XX “inutile.”¹⁴²

In rejecting the approach of the Panel decisions in both Tuna-Dolphin cases, the Appellate body emphasized the importance of the chapeau of Article XX in ensuring that environmental measures are not applied without regard for the differences among countries. Further consideration must also be given to the manner in which a measure is applied. Should the application be found rigid and inflexible, the discrimination may constitute “arbitrary discrimination” within the meaning of the chapeau of Article XX.¹⁴³

Interestingly, the Appellate Body gave weight to international environmental agreements concluded since the GATT 1947 was negotiated. This practice, in contrast to the Tuna-Dolphin Panels, should give some comfort to environmental advocates in the development of the reasoning practices of the Appellate Body.

5. Shrimp Turtle II

At the conclusion of the initial ruling in the Shrimp-Turtle I dispute, the Dispute Settlement Body made certain recommendations on measures necessary for the United States to come into compliance with GATT rules.¹⁴⁴ The U.S failed to change its applicable law,

138. See *Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 121; see also TREBILCOCK & HOWSE, *supra* note 53, at 531-32.

139. See TREBILCOCK & HOWSE, *supra* note 53, at 530.

140. *Shrimp-Turtle I AB Report*, *supra* note 110, ¶ 133.

141. *Id.* ¶ 121.

142. *Id.*

143. *Id.* ¶ 177.

144. Meinhard Doelle, *Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change Through the World Trade Organization*, 13 REV. EUR. CMTY. & INT'L ENVTL. L. 85, 91 (2004); see also Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*,

and instead changed the manner in which it applied the law. Specifically, it established criteria for the certification of exporting countries aimed at ensuring the protection of sea turtles through the requirement of measures “comparable in effect” to those of the United States.¹⁴⁵ A subsequent challenge was brought by a number of shrimp exporting countries as to the consistency of this modification with WTO rules.¹⁴⁶ The Appellate Body in *Shrimp-Turtle II* upheld the new rules as consistent with Article XX, concluding that the revised measure was sufficiently flexible to meet the standards of the chapeau.¹⁴⁷ It reasoned that the test of “comparable effectiveness” was sufficiently flexible to take into account special circumstances in the exporting country, while providing the necessary assurance to the country applying the environmental measure.¹⁴⁸

The Appellate Body then considered the obligation to pursue negotiations before applying unilateral measures, and the level of flexibility required for the measure to accord with the chapeau of Article XX. On the first issue, it was held that serious efforts in good faith to negotiate are sufficient, but that there is no obligation to conclude an agreement.¹⁴⁹ With its decision, the Appellate Body clarified any misconception of a duty to negotiate by concluding that the chapeau simply amounted to a requirement of a “comparable negotiating effort.”¹⁵⁰ Similarly, in a more recent case involving the United States and Aruba, the Appellate Body found that there was no duty to “consult” or “negotiate” with respect to measures taken by the United States to prevent certain gambling and betting services from being supplied by Aruban service providers.¹⁵¹ Although the case was decided under the General Agreement on Trade and Services (GATS), the Appellate Body concluded that the general exceptions

Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp-Turtle II AB Report*]; Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW (June 15, 2001) [hereinafter *Shrimp-Turtle II Panel Report*].

145. Doelle, *supra* note 144, at 91.

146. *Id.*

147. *Shrimp-Turtle II AB Report*, *supra* note 144, ¶ 144.

148. *Id.* ¶¶ 144-48.

149. *Id.* ¶¶ 115-34.

150. TREBILCOCK & HOWSE, *supra* note 53, at 536.

151. Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

of Article XX were set out in the same manner as those under the GATS.¹⁵² Accordingly, the Appellate Body found the Panels' requirement of consultations with a view to a negotiated settlement to be an inappropriate alternative for the Panel to have considered.¹⁵³

An interesting side note in the Shrimp-Turtle disputes is that prior to the Panel being requested in Shrimp-Turtle I, the United States Court of International Trade ruled, in a case brought by Earth Island Institute, that the provisions of the Endangered Species Act, which covered only the Caribbean/Western Atlantic region, had to be extended worldwide.¹⁵⁴ The court issued an order requiring the Secretary of Commerce to ban the importation of shrimp that were not harvested with fishing methods "comparable" to U.S. standards.¹⁵⁵ As a result of the Panel ruling in Shrimp-Turtle I, Congress modified the guidelines in 1998. Following the Appellate Body decision in Shrimp-Turtle I, however, the United States Court of International Trade ruled that the 1998 revised guidelines permitting the importation of shrimp caught with TED's from non-certified nations, was violative of U.S. law.¹⁵⁶ This intra-judicial clash raises an interesting question as to what extent the multilateral trading system may be affected by a U.S. court, or conversely to what extent U.S. legislation may be affected by declarations of international tribunals.

6. Domestic Emissions Trading

It is widely accepted that the implementation of international and domestic emissions trading systems will be significant weapons in the reduction of green house gas (GHG) emissions in the most economically efficient manner possible.¹⁵⁷ In December 1997, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) agreed to the text of the Kyoto Protocol.¹⁵⁸ Kyoto is the first international agreement with legally binding com-

152. *Id.* ¶ 291.

153. *Id.* ¶ 317.

154. *See Earth Island Inst. v. Christopher*, 913 F.Supp. 559 (Ct. Int'l Trade 1995).

155. *Miller & Croston, supra* note 61, at 92.

156. *See Earth Island Inst. v. Daley*, 48 F.Supp.2d 1064 (Ct. Int'l Trade 1999).

157. *See Brian Evans, Principles of Kyoto and Emissions Trading Systems: A Primer for Energy Lawyers*, 42 ALTA. L. REV. 167 (2004).

158. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 ILM 22 (1998) [hereinafter *Kyoto Protocol*].

mitments on the reduction of GHG emissions.¹⁵⁹ With its ratification most of the developed world has pledged to modest reduction targets for the period of 2008-2012.¹⁶⁰ The two largest per capita emitters, however, the United States and Australia, have so far opted not to join this effort to address climate change.¹⁶¹ The reasons given by the U.S. for refusing to initiate the ratification process, was a fear of injury to its economy, and the extension of voluntary compliance to developing countries.¹⁶²

Although the United States has thus far declined to ratify the Kyoto Protocol, it would be incorrect to assume that the U.S. has chosen not to deal with the issue of climate change, and in particular, the effect of greenhouse gas emissions.¹⁶³ In many respects, the United States has been a pioneer in the use of market-based policy instruments in the environmental arena.¹⁶⁴ A case in point is the American foray into domestic emissions trading. While the practice of domestic emissions trading does not directly implicate the WTO and the multilateral trading system, U.S. efforts in this regard illustrate the government's resolve in reconciling an aggressive environmental protection agenda with its obligations under the WTO.

Before elaborating on these efforts a brief description of emissions trading is in order. Quite simply, emissions trading refers to the process by which parties can buy or sell permits to emit regulated substances.¹⁶⁵ Essentially, the benefit that accrues from entitlement to an allowance or permit becomes a commodity, which can be traded among market participants.¹⁶⁶ Emissions trading significantly reduces the cost of controlling GHG's in that it is based on the economic principle that where the relative cost of performing an activity differs among actors, there are potential gains to be made from trade.¹⁶⁷ There are myriad ways in which an emissions trading system can operate, however, the one fundamental approach that will be addressed in this note is the cap and trade system.

159. Meinhard Doelle, *From Kyoto to Marrakech; A Long Walk Through the Desert: Mirage or Oasis?* 25 DALHOUSIE L.J. 113, 118 (2002).

160. *Id.*

161. *Id.* at 120.

162. *Id.*

163. See Evans, *supra* note 157, at 169.

164. See discussion *infra* pp. 220-221.

165. Evans, *supra* note 157, at 178.

166. *Id.*

167. *Id.*

A cap and trade system is created when a regulatory body sets a cap or limit on the absolute amount of emissions permitted from a source or group of sources.¹⁶⁸ The cap is usually designed to reduce the amount of emissions by setting the maximum at a lower level than historically allowed. For example, the Kyoto Protocol based the limits it imposed on levels from 1990.¹⁶⁹ Designed groups of emitters are then authorized to emit a certain proportion of the total amount allowed.¹⁷⁰ This policy may be practiced on a regional, national or international level. The Kyoto Protocol is the standard by which emissions trading is practiced on an international scale. Emitters who successfully reduce their omissions below their allocated level may sell their unused permits to others who have exceeded their allocated allowance. Likewise, participants emitting beyond their allocated allowance and in excess of any additional permits purchased from others would be severely penalized.¹⁷¹

Emissions trading is by no means a new concept. For example, in 1982 the U.S. Environmental Protection Agency (EPA) introduced a new maximum lead content for leaded gasoline. Trading was introduced as part of the EPA's program to reduce the maximum lead content for leaded gasoline.¹⁷² Participants could create lead rights capable of being sold to other market participants during the quarter in which they were created.¹⁷³ In addition, the EPA permitted these credits to be banked and used at a later date.¹⁷⁴ The lead credit trading program is credited with reducing the maximum lead content of gasoline much more rapidly than would have otherwise occurred.¹⁷⁵

More recent efforts by the United States in domestic emissions trading are seen in the amendments to the Clean Air Act.¹⁷⁶ This legislation created a comprehensive market-based program for the control of sulphur dioxide (SO₂) emissions from coal fired electric power plants. This program, also known as the Acid Rain Program, is designed to achieve a significant reduction in SO₂ emissions from

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Regulation of Fuels and Fuel Additives; Banking of Lead Rights, 50 Fed. Reg. 13,116 (Apr. 2, 1985) (to be codified at 40 C.F.R. pt. 80).

173. *Id.*

174. *Id.*

175. See Evans, *supra* note 157, at 180.

176. Clean Air Act, 42 U.S.C. § 7401 (2000); see also Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2584 (1990).

electric utilities between 1995 and 2010.¹⁷⁷ The Clean Air Act identifies the sources subject to the legislation along with their allowance allocation. Allowances were initially issued free of charge and were based on actual emissions from 1985, subject to certain adjustments.¹⁷⁸ The Acid Rain Program allowance market has been active since the early 1990's, and as of 2007 the average price paid at the annual SO₂ auction was \$444.39 per tonne.¹⁷⁹ This program has been extremely successful in reducing SO₂ emissions from power plants in an economically efficient manner.¹⁸⁰

At the regional level, the South Coast Air Quality Management District (SCAQMD) established the Regional Clean Air Initiatives Market (RECLAIM).¹⁸¹ This program is intended to reduce emissions of SO₂ and NO₂ in the Los Angeles basin via the capping of emissions and the allocation of allowances to emitters of SO₂ and NO₂. Each of the facilities identified receives an annual emissions allocation and an annual rate of reduction in emissions.¹⁸² Initially, the allowances were issued free of charge to participants based on prior production levels.¹⁸³ Credits are assigned each year and can be bought or sold for use within that year.¹⁸⁴ Facilities must hold credits equal to their actual emissions, and they can sell excess credits to firms that cannot or choose not to meet their limits.¹⁸⁵ By 2003, this program reduced emissions in NO₂ by seventy percent and SO₂ by sixty percent.¹⁸⁶

In assessing any emissions trading policy, whether it is domestic or international in scope, its comportment with WTO rules must be considered. If U.S. federal climate policy were to take the form of a cap and trade system, questions on its ability to impose a border tax

177. See Evans, *supra* note 157, at 181. Under the Acid Rain Program, affected utility units are allocated allowances based on their historic fuel consumption and a specific emissions rate. Each allowance permits a unit to emit 1 ton of SO₂ during or after a specified year. For each ton of SO₂ emitted in a given year, one allowance is retired, in that it can no longer be used.

178. *Id.* at 182.

179. 2007 EPA Allowance Auction Results, available at <http://www.epa.gov/airmarkets/trading/2007/07summary.html>.

180. Evans, *supra* note 157, at 182.

181. Regional Clean Air Incentives Market, 40 C.F.R. § 70 (1993) [hereinafter *RECLAIM*].

182. Evans, *supra* note 157, at 183.

183. RECLAIM, available at <http://www.aqmd.gov/reclaim/reclaim.html>.

184. See *id.*

185. See *id.*

186. *Id.*

adjustment under this system would be raised.¹⁸⁷ Under Article III:2 of the GATT, a border tax adjustment can be imposed on an imported product equal to an “internal tax or other internal charge of any kind.” This is significant in that if a cap and trade measure or similar measure (carbon tax), were to be applied domestically the classification of the allowance as a tax or internal charge would conceivably allow the U.S. to impose a commensurate import levy on like foreign products.¹⁸⁸ Once again U.S. efforts at implementing domestic environmental policy would be influenced by how the Appellate Body ruled in this matter.

IV. RECONCILING THE CONFLICT BETWEEN THE WTO, TRADE AND THE ENVIRONMENT

A. Article XX

During the ongoing conflict between environmental advocates and proponents of free trade, the decisions from the cases described *supra* have been relied on to highlight the concerns that environmentalists have in this regard.¹⁸⁹ These concerns center on the fear that the goal of free trade will lead to the relaxation of U.S. environmental policy.¹⁹⁰ This pessimism, however, does not take into account the existence and usefulness of Article XX of the GATT. The environmentalist outlook is predicated on the premise that there is no objective measure to overcome the requirements of the GATT in implementing environmental policy. This could not be further from the truth. Notwithstanding the decisions of the cases already cited, it should be noted that the Appellate Body has acknowledged, in both *EC-Asbestos* and *Shrimp Turtle I*, the validity of unilateral trade measures aimed at protecting the environment.¹⁹¹ While the decisions in these cases did not declare a *per se* rule against the environ-

187. See Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law 21* (Nicholas Inst. for Env'tl. Pol'y Solutions, Working Paper No. 07-02, 2007), available at <http://www.nicholas.duke.edu/institute/knowledge-energy.html>.

188. *Id.*

189. See Nita Ghei, *Evaluating the WTO's Two Step Test for Environmental Measures Under Article XX*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 117 (2007).

190. *Id.*

191. See *EC-Asbestos* ¶ 168, *supra* note 50; *Shrimp-Turtle II AB Report* ¶ 144, *supra* note 144.

mental trade measures employed, they went to some lengths in clarifying the standards required for these measures to be suitable for an Article XX exception. Thus, the Appellate Body recognized the validity of unilateral trade measures aimed at protecting the environment, but was also sensitive to their potential for abuse. It is this type of nuanced balancing act in which the WTO must engage, deciding whether a measure is a disguised restriction on free trade or a legitimate exercise of self-governance.¹⁹² The WTO has the unenviable task of advancing the goals of the multilateral trading system while concomitantly taking care not to dilute legitimate efforts of sovereign states to implement their environmental agenda. Therefore, rather than condemn the dispute settlement bodies for the conclusions that they did not reach, perhaps the more apt response is to examine those conclusions which were rendered.

Grounds for optimism for environmental advocates lie in the Appellate Body's move away from the test of whether the measure in question is the *least* trade restrictive manner to achieve the environmental objective. Rather, the focus is now on whether there is a *less* trade restrictive means of obtaining the same goal.¹⁹³ The implications of this change in position are indicative of the emergence of the WTO's emphasis on "sustainable development" as a stated goal for the multilateral trading system. Towards this end, the Appellate Body has conceded as legitimate under WTO law, the extraterritorial application of an environmental protection measure.¹⁹⁴ Although this jurisdictional interpretation by the Appellate Body is relevant only to the discussion of Article XX (g), it is at the very least more generous than that of the panels in Tuna-Dolphin I and Tuna-Dolphin II.

Although unilateral measures will be tolerated the WTO dispute settlement bodies favor multilateral action over unilateral action.¹⁹⁵ With this in mind it is easier to understand why the U.S. attempts at applying its environmental protection measures failed. The United States failure to extend their efforts at multilateral negotiation to *all* affected parties, in Shrimp-Turtle I, was at the heart of the Appellate Body's finding that the measure being evaluated was inconsistent with the chapeau of Article XX. This again was an immense depar-

192. See Ghei, *supra* note 189, at 120.

193. *EC-Asbestos* ¶ 172 *supra* note 50.

194. See *Shrimp-Turtle I AB Report* ¶ 133, *supra* note 110.

195. See *Shrimp-Turtle II AB Report* ¶ 137, *supra* note 144; see also *Shrimp-Turtle I AB Report* ¶ 121, *supra* note 110.

ture from the Panel in its earlier decision of this case. The Panel in Shrimp-Turtle I clearly embraced the view that all unilateral environmental measures were inconsistent with the chapeau on the basis that they threaten the multilateral trading system.¹⁹⁶ The Appellate Body retreated from this position not just in its analysis of Shrimp-Turtle I, but also in its subsequent approval of the same measure in Shrimp-Turtle II.

Once again, in Shrimp-Turtle I, the Appellate Body expanded the scope of Article XX (g) when it overruled the Panel's view that a living resource should be distinguished from an "exhaustible natural resource" within the terms of Article XX (g). Moreover, the Appellate Body adopted several multilateral environmental agreements as interpretational tools in arriving at this conclusion.¹⁹⁷ This reliance on and reference to multilateral environmental agreements in the context of a WTO dispute is especially noteworthy, and portends a new approach to the resolution of these types of disputes.¹⁹⁸

The overall conclusion from the case law to date appears to be that measures that address environmental protection efforts will be acceptable under WTO law if those measures treat like products alike. If they do not, the different treatment will have to be justified under Article XX (b) or (g). Those most likely to succeed under these provisions will be measures with clear environmental objectives that have as much flexibility as possible on meeting those objectives. Measures that are applied without first consult or deliberation with the countries affected by the measures are also less likely to be saved by Article XX, unless there is no less restrictive way of achieving the Article XX (b) or (g) objective.

B. Eco-Labeling

Part of the complaint, not yet addressed in this note, against the United States in the Tuna-Dolphin I case concerned a labeling scheme established by certain provisions of the Dolphin Protection Consumer Information Act (DPCIA).¹⁹⁹ In response to the voluntary actions of some American companies to implement a "Dolphin-Safe" tuna label on their products, Congress enacted the DPCIA in

196. FIONA MACMILLAN, *WTO AND THE ENVIRONMENT* 103 (2001).

197. *Id.* at 92.

198. *Id.*

199. Dolphin Consumer Protection Information Act of 1990, 16 U.S.C. § 1385 (2000).

1990.²⁰⁰ This statute established the requirements for labeling products as “Dolphin-Safe,” which were engaged on a voluntary basis by companies marketing tuna sold in or exported from the U.S. Once again, the use of purse seine fishing nets were discouraged, and vessels in the Eastern Tropical Pacific Ocean could not intentionally set these nets on dolphins during their voyages.²⁰¹ The Panel in Tuna-Dolphin I found this labeling scheme to be consistent with the MFN obligation of Article I.²⁰² This was because the labeling regulations applied to all countries that fished in the Eastern Tropical Pacific Ocean and involved no distinction based on the products’ origin.²⁰³ As a result, the use of what is termed “eco-labeling” has essentially been adopted by the WTO.²⁰⁴

Eco-labeling schemes must comply with all WTO/GATT requirements, this includes the TBT Agreement which governs any regulation or standard. While there are areas of overlap between the GATT and TBT, any potential conflict is governed by the TBT.²⁰⁵ While the majority of mandatory labeling measures will fall under both the GATT and TBT, the same cannot be said of voluntary measures. Voluntary eco-labeling related to product characteristics will fall under the TBT Agreement if they are “standards” within that defined term of the Agreement. This requires that they be set by a recognized body such as a governmental organization.²⁰⁶ If the standard is set solely by the private industry with no government involvement, it may not fall within this definition.²⁰⁷ Mandatory standards, on the other hand, will fall within the term “technical regulation,” and thus be subject to the requirements of the TBT.²⁰⁸ Moreover, should the labeling scheme be found not “related” to the process and production method, this too would likely preclude its applicability to the TBT.²⁰⁹ There is an additional emphasis under the TBT Agreement on the use of international standards as a basis

200. See Miller & Croston, *supra* note 61, at 99.

201. *Id.* at 100.

202. See *Tuna-Dolphin I* ¶ 4.02, *supra* note 59.

203. See *id.*

204. See *2004 Report*, *supra* note 12, at 17.

205. See Agreement Establishing the World Trade Organization, General Interpretive Note to Annex 1A, 33 ILM 1144, 1154 (1994).

206. See *TBT Agreement* art. 1.2 & Annex 1(2), *supra* note 36.

207. Green, *supra* note 58, at 163.

208. See *TBT Agreement* art. 1.2 & Annex 1(1), *supra* note 36.

209. See discussion, *infra* pp. 226-231.

for technical regulations.²¹⁰ Article 2.5 of the Agreement creates a rebuttable presumption that a measure, “in accordance with relevant international standards,” does not create an unnecessary obstacle to trade.²¹¹

The acceptance of the U.S. eco-labeling scheme with respect to dolphin-safe tuna seemed to be based primarily on the grounds that the program’s requirements were voluntary and not mandatory.²¹² The validity of an eco-labeling scheme with respect to WTO obligations would seem to hinge on whether or not it fits into the voluntary versus involuntary category. In addition, these two groups are generally the consequence of whether they are negative or positive in nature.²¹³ Mandatory schemes require producers or sellers to identify qualities that consumers may perceive as negative and would prefer to avoid.²¹⁴ Positive labeling, on the other hand, allows producers or sellers to identify characteristics that might be deemed desirable by consumers.²¹⁵ There is a dearth of case law in this regard, however, on the basis of the Panel decision in *Tuna-Dolphin I*, it would appear that voluntary (positive) labeling schemes stand the best chance of surviving a WTO challenge. This does not mean that mandatory (negative) eco-label requirements would not be permissible under WTO rules. On the contrary, if these requirements are applied in a non-discriminatory manner, and adhere to both the MFN and National Treatment obligations, they would likely be found consistent with both of these provisions.²¹⁶

The position of the WTO on eco-labeling has evolved from the original decision in *Tuna-Dolphin I*. It is now generally agreed that “voluntary, participatory, market based and transparent environmental labeling schemes are economically efficient instruments to inform consumers about environmentally friendly products.”²¹⁷ Furthermore, WTO members recognize that eco-labeling schemes tend

210. Green, *supra* note 58, at 180; see also *TBT Agreement* art. 2.4, *supra* note 36.

211. See *TBT Agreement* art. 2.5, *supra* note 36; see also Green, *supra* note 58, at 180.

212. See MACMILLAN, *supra* note 196, at 114.

213. *Id.*

214. *Id.*

215. *Id.*

216. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 294 (1997).

217. 2004 Report, *supra* note 12, at 17.

to restrict trade less than other measures.²¹⁸ The latest U.S. effort to implement an eco-labeling measure involves the “Energy Star” efficiency program.²¹⁹ Energy Star is a voluntary performance based labeling scheme covering more than 50 product categories.²²⁰ It is a self certification measure created with the objective of reducing greenhouse gas emissions, and assisting consumers in identifying and purchasing products with enhanced energy efficiency.²²¹

The environmental labeling system is a process by which the market itself rewards the environmentally friendly producers. This has the potential for achieving environmental objectives while minimizing interference with the multilateral trading system.²²² In light of the general acceptance of these types of measures, they should prove to be an invaluable resource to environmental advocates in reconciling the concerns of trade and the environment.

C. *Process and Production Methods*

The more problematic issue in the eco-labeling debate has been the use of criteria linked to the Process and Production Methods (PPMs) of a given product.²²³ WTO members agree that countries are within their rights under WTO law to establish criteria for the manner in which products are produced, if the method of production leaves a “trace” in the final product.²²⁴ Where members disagree is whether a measure is consistent with WTO rules when they are based on “unincorporated” PPMs.²²⁵ These non-product related PPMs leave no trace of the production method in the final product.²²⁶ As a result, many developing countries contend that any discrimination between products based on non-product related PPMs, such as some eco-labels, is inconsistent with WTO law.²²⁷ Those PPMs that are directly related to the characteristics of the product concerned, for example, pesticides used on crops or hormones used on cattle in the

218. WTO, Environment: Issues – Labeling, http://www.wto.org/english/tra-top_e/envir_e/labelling_e.htm.

219. *Id.*

220. *Id.*

221. *Id.*

222. See Rich, *supra* note 35, at 21.

223. See 2004 Report, *supra* note 12, at 17.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

production of meat, are regulated by two separate codes.²²⁸ The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the TBT govern the application of such measures.²²⁹

The SPS Agreement governs additives, contaminants, toxins and disease carrying organisms in consumable products, or damage caused by the entry, establishment or spread of pests.²³⁰ The TBT Agreement covers all technical requirements, voluntary standards and the procedures to ensure that these are met, except when they are SPS measures as defined by the SPS Agreement.²³¹ In Annex 1 of the TBT Agreement, a technical regulation is defined as a “document that lays down product characteristics or their *related* processes and production methods.”²³² The accepted interpretation of this clause has been that this excludes non-product related PPMs.²³³ The SPS Agreement includes, in its covered measures, those that apply to “process and production.”²³⁴ Yet because SPS applies to measures seeking to protect life or health *within* the territory of the importing country, non-product related PPMs on imported goods would seem to be excluded by this limitation.²³⁵ These Agreements effectively serve to limit a state’s ability to adopt different treatments for separate products with the same physical characteristics on the basis of how the products were produced or harvested.²³⁶

Inherent in the provisions of the SPS Agreement is the question of the precautionary principle and its relevance in the interpretation of the Agreement. This is an important question especially in light of its presence in the Rio Declaration, which provides:

“In order to protect the environment, the precautionary approach shall be widely applied by the States according

228. See Schoenbaum, *supra* note 216, at 288.

229. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, *reprinted in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 1125 (1994) [hereinafter *SPS Agreement*]; *TBT Agreement*, *supra* note 36.

230. *SPS Agreement* art. 1.3, *supra* note 229.

231. *Id.* at art. 1.4.

232. TREBILCOCK & HOWSE, *supra* note 53, at 526; *see also* *TBT Agreement* Annex 1, *supra* note 36.

233. TREBILCOCK & HOWSE, *supra* note 53, at 526.

234. *SPS Agreement* ¶ 1, *supra* note 229.

235. See Steven Charnovitz, *The Law of Environmental “PPM’s” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 65 (2002).

236. Schoenbaum, *supra* note 216, at 288.

to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”²³⁷

Its relevance in international law is underscored by its inclusion in the Maastricht Treaty. This, notwithstanding, the precautionary principle is still the subject of some debate.²³⁸ In WTO law the principle is implicitly embodied in Article 5.7 of the SPS Agreement, which provides that where scientific evidence is insufficient, governments may “provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information.”²³⁹ Even though the precautionary principle is not explicitly provided for in WTO legal text, the Appellate Body has spoken on some of the key aspects of the principle’s content in a case involving the European Community.²⁴⁰ Under the SPS Agreement, a member’s health measure must be “based on” a scientific risk assessment.²⁴¹ In *EC-Hormones*, the Appellate Body understood the term “based on” to require a rational relationship between the measure and the risk assessment.²⁴² In so doing, the Appellate Body reversed the Panel’s reading that a risk assessment must have actually been taken into account in the measure’s implementation.²⁴³ The decision in this case recognizes that where scientific evidence is insufficient, Article 5.7 will justify a measure not based on a risk assessment.²⁴⁴ The Appellate Body was careful to note, however, that although the precautionary principle is embodied in Article 5.7, it cannot be invoked outside of Article 5.7 to override other provisions of the SPS Agreement.²⁴⁵ The precautionary principle does not supplant any of the provisions of the SPS,

237. Rio Declaration Principle 15, *supra* note 11.

238. See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 123, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC-Hormones*].

239. Jan Bohanes, *Risk Regulation in WTO Law: A Procedure Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT’L L. 323, 335 (2001-2002); *SPS Agreement* art 5.7, *supra*, note 229.

240. See *EC-Hormones*, *supra* note 238.

241. See *SPS Agreement* arts. 2.2, 5.1, *supra* note 229.

242. See *EC-Hormones*, *supra* note 238, ¶ 193.

243. TREBILCOCK & HOWSE, *supra* note 53, at 210.

244. See *EC-Hormones*, *supra* note 238, ¶ 124.

245. Bohanes, *supra* note 239, at 336.

instead the Appellate Body uses it as a tool to interpret those provisions in which it does apply.²⁴⁶

The Tuna-Dolphin I dispute brought to the forefront the difficulties involved in accommodating non-product related PPMs. The U.S. ban on the importation of tuna did not have to do with tuna as a product, but rather with the way in which it was caught (purse sein fishing nets which caused the incidental deaths of dolphins). The Panel's like product analysis in both Tuna-Dolphin I and Tuna-Dolphin II, concluded that distinctions based on other than the physical characteristics of a product did not satisfy Article III:4's National Treatment obligation.²⁴⁷ Although a different approach has been taken in other panel decisions, the "trade policy elite has simply accepted the notion of a sharp divergence between measures on products and PPMs as if such a distinction had been written into the GATT all along and not simply invented in the Tuna-Dolphin case."²⁴⁸ Since that dispute developing countries have been sensitive to the extraterritorial application, by developed countries, of their environmental standards. The argument goes that different countries have different optimum levels of pollution that they are willing to sustain and trade off in their quest to become more developed.²⁴⁹ As these levels differ between countries, one country's standards should not be imposed on another.²⁵⁰ Standardizing process and production methods can affect the comparative advantage that a developing country may enjoy.²⁵¹ Because a disruption of the cost structure for the production of various goods impacts the less developed nations of the world more negatively than it might for the United States, these distinctions are inherently unfair.²⁵²

246. See TREBILCOCK & HOWSE, *supra* note 53, at 210.

247. *Id.* at 525.

248. *Id.* at 526. The authors discuss the unadopted Panel Report (US-Taxes on Gasoline) which took a contrary approach to that taken in the Tuna-Dolphin cases. Here, the Panel held that the distinction in question – automobiles that met federally mandated fuel economy requirements, as opposed to those that did not – served a legitimate non-protectionist objective, the conservation of fossil fuels. Thus, for purposes of Article III, imports that did not meet the standard were not considered 'like' products to those that did. This dichotomy of approaches has not expanded the ambit of non-product related PPMs.

249. See Duncan Brack, *Balancing Trade and the Environment*, in *International Affairs* (Royal Inst. of Int'l Affairs 1944-), Vol. 71 No. 3, Ethics, the Environment and the Changing International Order 505 (Jul. 1995).

250. *Id.*

251. *Id.*

252. *Id.*

An attendant argument against the use of PPMs in the environmental policies of developed countries stresses the need to preserve territorial sovereignty.²⁵³ This concern was raised by some in the U.S. when the environmental trade measures, in the cases already discussed, were found inconsistent with the WTO. The prevention of discrimination between products on the basis of PPMs means that choices made within national boundaries are respected.²⁵⁴ In addition, developing countries argue that many of the global environmental problems that currently exist have been created by the developed countries and not themselves, thus, it is those countries that should bear the greatest burden in their resolution.²⁵⁵

Critics of these arguments usually respond that other articles of the GATT do permit discrimination under certain circumstances.²⁵⁶ Moreover, one nation's territorial sovereignty should not permit that state to engage in destructive practices that affect those outside of its borders without some form of remuneration.²⁵⁷ Although the direct environmental impact of production methods based in a foreign land is difficult to assess, there is the fear that the economic consequences may be more direct.²⁵⁸ Domestic producers are encumbered by higher costs of compliance with the regulatory scheme of the importing country.²⁵⁹ This raises the fear that they will be undercut by competition from companies based in countries with significantly less regulation and lower production costs.²⁶⁰ This has often been referred to as the "race to the bottom," where manufacturers will be led to those countries where costs of production are ostensibly lower as a result of more lenient environmental policies.²⁶¹

The position of the WTO dispute settlement bodies with respect to non-product related PPMs makes little sense. Domestic environmental regulations on PPMs are the norm. Factories are told how much pollution they may emit, lumber companies are told how and where they may harvest trees, and chemical companies are told how they must treat their waste. So from an environmental perspective, it

253. Motaal, *supra* note 6, at 333.

254. *Id.*

255. *Id.*

256. *See, e.g., GATT Article XX, supra* note 37.

257. *See Brack, supra* note 249, at 507.

258. *See id.*

259. *See id.*

260. *See id.* at 507-08.

261. *See Schoenbaum, supra* note 216, at 293.

makes sense to also be able to discriminate at the border between otherwise like goods that were produced in environmentally different ways. Admittedly, allowing discrimination based on PPMs would present some difficulties for the trading system. It might provide governments a greater opportunity to protect their domestic industries unfairly against foreign competition. Notwithstanding the potential for exploitation, non-product related PPMs are an important tool in managing one of the true global concerns we face today. They are a reflection of a failed multilateral response, and the efforts to achieve consensus that have taken precedence over fixing our deteriorating environment. While it is easy to point fingers and characterize PPMs as a form of environmental imperialism, at some point discord has to give way to action. This is not to say that any PPM, product related or not, should not be subjected to scrutiny by the WTO to determine whether it is protectionist or not.²⁶² Rather, the inquiry should be directed at whether the government of the importing country has a legitimate environmental concern about the production practices of the exporting country.²⁶³ While special consideration should be given to those instances where a non-product related PPM was initiated at the behest of domestic producers, this should not be dispositive of protectionist intent.²⁶⁴

V. CONCLUSION

Over the years, decisions of the WTO Dispute Settlement Body have undergone a protracted but gradual metamorphosis. The early cases examining the scope of Article XX developed strict interpretations of the Article's provisions limiting the role for unilateral action in environmental protection. More recently, however, the Appellate Body has taken a position more consistent with the global environmental concerns associated with international trade. While this may be far from the ideal that is currently debated, it does signal a significant departure from the early case law involving environmental trade measures. The Appellate Body has recognized that while unilateral measures are not consistent with the stated goals of the WTO,

262. See Charnovitz, *supra* note 235, at 74.

263. See *id.*

264. See *id.*

they are justifiable when rooted in the purposes of Article XX and administered even handedly.²⁶⁵

Recent case law has resulted in a number of other changes with regard to how the WTO examines the environmental trade measures of its member countries. Diverging from earlier decisions, the Appellate Body now recognizes the significance of multilateral environmental agreements in its analysis of contested environmental measures. The proliferation of eco-labeling schemes is another area of common ground between the concerns of international trade and environmental protection. And in yet another variation from an earlier position, the WTO has come to recognize the validity of trade measures directed at another member's environmental policies.

The decisions effecting these changes reflected a need for the WTO to give specific recognition to environmental concerns to which the WTO responded accordingly. Although there is a sizable consensus that the decisions discussed in this note were decided correctly, the WTO adeptly responded to the concerns of its member nations as well as to the international community at large. This process of accommodation will require an ongoing effort to respond to the conflicts that will continue to arise in the fields of international trade and environmental protection.

While the jurisprudence of the Dispute Settlement Body has been the mechanism by which many of these changes have occurred, they were precipitated by a growing international concern regarding the impact of economic growth on the world's environment. These concerns were distilled in the WTO report on trade and the environment which reflects the evolving position of the WTO, and is indicative of the relative importance it now places on reconciling the conflict between trade and the environment.

265. See Brandon L. Bowen, *The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, 29 GA. J. INT'L & COMP. L. 181, 201 (2000).